Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1971

No. 71-548

STEVEN HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
to the Appellate Department of the Superior Court, in and for the County of Alameda, State of California

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to the Appellate Department of the Superior Court,
in and for the County of Alameda,
State of California

Petitioner Steven Hamilton prays that a writ of certiorari issue to review the opinion and judgment of the Appellate Department of the Superior Court in and for the County of Alameda, State of California, entered in the above-entitled case on July 20, 1971.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court in and for the County of Alameda, State of California, is unreported and reproduced as Appendix B to this petition. Prior to trial petitioner sought a petition for writ of prohibition from the Superior Court of Alameda County, contending that the contempt citation was unconstitutionally issued. The petition was denied on July 6, 1967. The denial was affirmed by the Court of Appeal of the State of California, First Appellate District. The opinion of that Court, reported as *Hamilton v. Municipal Court*, 270 Cal.App.2d 797 (1969), *cert. denied* 396 U.S. 985 (1969), is reproduced as Appendix A to this petition.

JURISDICTION

The opinion of the Court below was entered on July 20, 1971. A petition for rehearing and certification of the case to the state Court of Appeal was timely filed on July 23, 1971. The petition for rehearing and certification was denied by order and judgment entered on July 27, 1971. Denial of the application for certification exhausted all appellate remedies available to petitioner making the opinion of the Court below the final judgment of the highest state court. See, e.g., *Schnerber v. California*, 384 U.S. 757 (1966) and *Edwards v. California*, 314 U.S. 160 (1941). The time in which to file a petition for writ of certiorari expires either on October 25,

1971, or October 18, 1971, depending upon whether the date upon which the denial of certification was filed or the date upon which the opinion of the Court below was filed is deemed controlling. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether, consistent with the First and Fourteenth Amendments, a pre-trial publicity order, which proscribes all comment by a defendant on "any issue likely to be involved" in a criminal trial (instead of only those comments which would be prejudicial to the trial's outcome) may serve as the basis for criminal conviction when there has been no factual showing that there was any danger that comments by the defendant could prejudicially influence the trial's outcome and when there has been no demonstration that the statements in fact made by the defendant affected, prejudicially or otherwise, the trial's outcome.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

United States Constitution, Fourteenth Amendment:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code §166(4):

"Every person guilty of any contempt of court of either of the following kinds, is guilty of a misdemeanor:

. . . . . .

"4. Willful disobedience of any process or order lawfully issued by any court;"

STATEMENT OF THE CASE

Petitioner was part of a group of ten persons arrested November 30, 1966, on various misdemeanor charges arising out of a demonstration on the Berkeley campus of the University of California. The purpose of the demonstration was to protest the presence on the campus of recruiters for military service in the armed forces of the United States. Those arrested, including petitioner, were arraigned before the Municipal Court for the Berkeley-Albany Judicial District. On December 16, 1966, the Honorable George Brunn of that Court issued the following pre-trial order:

Pretrial Publicity Order

To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day,

A. The parties shall not, directly or indirectly, release to any news media information or opinion

concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations.

The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter.

On January 13, 1967, petitioner participated in issuing the following written statement to the press:

We have decided to speak to the Press for the following reasons:

1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.

2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the prosecution always attempts to hide political activities behind legal language.

3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.

The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.

Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If his is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

Nobody planned in advance the sit-in that occurred. The University had in the past permitted

picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protester, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Vietnam Day, and Black Power Day. This is, then, clearly a case of political persecution.

As to our rights to be active politically on the Campus, we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them.

Petitioner was arrested on the same day the statement was issued and charged with a misdemeanor violation of Penal Code §166(4). Three days later,

January 16, 1967, petitioner went to trial on the original charges, was convicted and sentenced.

Petitioner then sought a writ prohibiting his trial on the contempt charge. The writ was denied (Appendix A) and the contempt case went to trial. At the trial, petitioner testified that the statement of January 13, 1967, had been issued because he and his co-participants felt they were unfairly deprived of an opportunity to answer criticisms made of them in the press[1] and because they felt it infringed their First Amendment rights of free expression. The statement was issued only after consultation with attorney Melvin Belli of San Francisco. Mr. Belli, who was represent-

[1]Press-clippings were introduced into evidence as exhibits by petitioner at the trial. They, together with the Settled Statement on Appeal, from which the above narrative is derived, constitute the record on appeal. They reveal that the events of November 30, 1966, including the arrest of petitioner, prompted a "student strike" which swept the Berkeley campus during the pre-Christmas season. The "sit-in," petitioner's arrest and arraignment, and the ensuing "student strike" received enormous publicity in the press —mostly condemnatory in character. On December 2, 1966, the *Berkeley Daily Gazette* editorialized that "if the provocateurs must be arrested twice a day and hauled off to Santa Rita, then that is what should be done. The nonstudent radicals must be stopped and stopped now. They must not be allowed to continue to mislead and agitate the campus." (Item B, *Gazette* clippings.) The same editorial also charged that petitioner and his co-defendants were part of a long range, carefully planned program of the "radical left" to disrupt the University and the City of Berkeley as the "target city of the leftward movement." While some faculty members expressed support for the strike demands, others joined Chancellor Roger W. Heyns in declaring that "outsiders came on campus with the intention of breaking campus rules and they did so. In addition, state laws were violated and arrests were made. . . . The University must have the authority to protect itself from such illegal intrusions to insure its operation and integrity." (Item C-2, *Gazette* clippings.) Governor-Elect Reagan charged that petitioner and his co-defendants were "middle-aged juvenile delinquents hanging around the University." (Item b, *Oakland Tribune* clippings.) An *Oakland Tribune* editorial on the subject warned against granting any amnesty in the cases. (Item b-2, clippings.)

ing petitioner and his co-defendants on the charges arising from the demonstration, advised them that the court order was unconstitutional and that it could and should be tested by issuing a statement. Petitioner conceded that Judge Brunn had not been asked to modify the order but explained that Mr. Belli informed neither him nor his co-defendants that an application for modification was an alternative procedure and advised both him and his co-defendants that the only way to test the order was to issue a statement. Petitioner further testified that his intention and purpose in participating in issuing the statement of January 13, 1967, was, on advice of counsel, to test the constitutionality of a court order that he and counsel believed violative of the First and Fourteenth Amendments to the United States Constitution.

Petitioner contended, at trial, that his conduct was constitutionally protected and not criminally punishable because 1) the order of December 1966 is unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and 2) there is no evidence that petitioner willfully violated the court's order because the evidence establishes that petitioner participated in issuing the statement on advice of counsel and for the purpose of challenging the constitutionality of the Court order.

Petitioner was found guilty as charged and, on June 1, 1970, was sentenced to county jail for 180 days (140 days suspended), three years probation and a fine of $500.00.

The Appellate Department of the Superior Court affirmed the conviction, declined to certify the case to the California Court of Appeal and declined to stay the execution of petitioner's sentence.

By order dated August 18, 1971, Mr. Justice Marshall stayed execution of petitioner's sentence pending disposition of this certiorari petition.

REASONS FOR GRANTING THE WRIT

Petitioner was arrested during a demonstration at the University of California. Subsequent to his arrest and arraignment he released a statement in which he expressed these ideas:

1. He was opposed to court restraints on statements by defendant in "political trials."

2. The incident that resulted in his arrest involved constitutionally protected conduct.

3. The "sit-in" demonstration in which he participated was not a calculated one, as some had contended in public print, but spontaneous.

4. He and his co-defendants had been singled out for arrest because of their political views.

5. The very statement he was making was constitutionally protected.

Because he made that statement he will, unless this Court rules otherwise, spend at least 40 days in the county jail, three years on probation and will pay a fine of $500.00. He will do so in spite of the fact that everything he said would appear, on its face, to be

constitutionally protected and although there seems to be no legitimate governmental purpose served by punishing him for his utterance.

What petitioner had to say was surely of public moment. Surely the public would be interested in knowing whether persons who had participated in the sit-in demonstration agreed with the official's contentions that the sit-in was calculated and not spontaneous. The public had already been exposed to the "conspiracy" theory of the sit-in; had the defendants remained silent on the matter the public would naturally infer that the official version was indisputably correct. The people had heard the government's side, why should they not hear the other side?[2]

Whether the sit-in had been calculated or not would seem to be beside the point at the criminal trial, because petitioner and his co-defendants were not charged with a conspiracy. Manifestly, then, that portion of the statement could not conceivably have prejudiced the prosecution's case in the impending trial.[3] Indeed, it is difficult to perceive how any of petitioner's statements could have posed any genuine

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[2]The public statement ban, it will be remembered, extended to "agents and employees and to the Associated Students of the University of California, their members and affiliated organizations." The ban, in other words, reached everyone remotely connected with the sit-in.

[3]Nor could petitioner's expressed disapproval of pre-trial publicity orders have conceivably had any effect on his prosecution. But that statement too is part of petitioner's offense and a portion of the general verdict of conviction. Since his conviction rests at least partially on expression unquestionably protected by the First Amendment, his conviction is, under any theory of the case, constitutionally infirm. See *Street v. New York*, 394 U.S. 576, 585-587 (1969) and authorities therein collected.

threat of prejudice to the prosecution's case. More importantly, the record does not show how the statements could have prejudiced the case because prejudice to the prosecution's case was not an element of the offense. The sweeping restraint on expression issued by Judge Brunn does not limit itself to statements that could prejudicially affect the trial and does not set forth any factual findings that would suggest that any statements by anybody could have had a prejudicial effect on the trial. Accordingly, the prosecution was under no burden to prove potential or actual prejudice, it only had to establish that petitioner "directly or indirectly, release[d] to any news media information or opinion concerning the trial or any issue likely to be involved therein. . . ." And that is all that it did.

The rule in petitioner's case, the rule now obtaining in California, is that a trial court may, without demonstration of necessity, issue an order prohibiting parties in a trial, and an entire University community, from making any public remark about the trial or any issue which might arise at the trial.

The California rule[1] squarely conflicts with decisions of this Court holding that where courts employ their contempt powers to punish otherwise constitu-

[1]The California approach to pre-trial restraints on public statements is similar to the one adopted in the Tenth Circuit. See *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969) *cert. denied* 396 U.S. 867 (1969). The rule in Washington and the Seventh Circuit conflicts, at least in principle, with the California and Tenth Circuit decisions. See *State ex rel., Superior Court of Spokomish. Co. v. Sperry*, 79 Wash.2d 69, 483 P.2d 708 (1971); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); cf. *Dorfman v. Meisner*, 430 F.2d 538 7th Cir. 1970).

tionally protected speech they can do so only pursuant to the clear and present danger standard[5] as well as the general doctrine invalidating restraints on free expression which have not been drawn with narrow specificity so as to be no broader than necessary to prevent the evils sought to be regulated.[6]

The facts of this case illustrates the wisdom of those general principles and the peril to fundamental liberties posed by their abandonment. Petitioner's criminal act was a "political" matter. That is to say, the criminal event, a sit-in demonstration was, in addition to being a proscribed act, a public event which excited general remark and interest. The public wanted to know what motivated the demonstrators, the demon-

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[5] *Wood v. Georgia*, 370 U.S. 375 (1962); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1946); *Bridges v. California*, 314 U.S. 252 (1941). See also *Worcester Telegram and Gazette, Inc. v. Commonwealth*, 238 N.E.2d 861 (Mass. 1968). On the continuing vitality of the clear and present danger test generally, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[6] See, e.g., *United States v. Robel*, 389 U.S. 258, 268 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). That general rule is, of course, particularly appropriate where a prior restraint is concerned for a prior restraint bears "a heavy presumption against its constitutional validity." See, e.g., *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). And the general rule requiring precision in regulation of fundamental liberties is, of course, applicable to court orders. As this Court observed in *Carroll v. Commissioners of Princess Anne County*, 393 U.S. 175, 183-184 (1968):

> ". . . An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. . . ."

strators wanted the public to be informed about their motivations and inspirations. Emphasizing the spontaneity of their act was of profound importance to the demonstrators; they did not want the public to imbue what they considered an idealistic act with a base and ulterior purpose. Their criminal conduct had also been communicative conduct and they did not want their message obscured.[7]

But even though petitioner did no more than issue a public statement on a matter of vital interest to the local community and even though that statement could not realistically be said to pose any substantial danger to any legitimate state concern, he has been criminally punished by California for its utterance. Petitioner is being punished on the authority of *Sheppard v. Maxwell*, 384 U.S. 333 (1966). California has adopted the guidelines there suggested for protecting a defendant's constitutional right to a fair trial and transmuted them into a restraint on the right of free expression of a criminally accused who affirmatively desires to exercise that right. If *Sheppard v. Maxwell* has overruled *Bridges v. California, supra*, then the rule restraining free expression ought at least be limited, by *Sheppard's* own terms, to matters which could conceivably prejudice the outcome of the

[7]This Court has previously recognized the communicative nature of a sit-in demonstration. *Brown v. Louisiana*, 383 U.S. 131 (1966). It has also recognized that criminal conduct can be communicative. *United States v. O'Brien*, 391 U.S. 367 (1968). It is not petitioner's contention that this criminal act, because intermixed with political expression, was constitutionally protected. *O'Brien* settled that. But petitioner does insist that the state cannot politically silence him by the simple expedient of charging him with a crime.

trial. See *Sheppard v. Maxwell, supra,* 384 U.S. at 361-363.

Sheppard, however, should not be read to overrule *Bridges. Bridges* recognizes that the judiciary, along with the legislative and executive branch of the government, is controlled by the First Amendment. Petitioner's case, after all, is not at all unique. It is not unusual, in our nation, for a criminal trial to involve matters which are of immediate public concern. De Toqueville's observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question . . ."[8] is as accurate today as it was in 1835.[9]

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[8] 1 DEMOCRACY IN AMERICA, 280 (Bradley Ed. 1948).

[9] This Court made an observation similar to de Toqueville's in *Bridges v. California, supra,* 314 U.S. at 268-69:

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.
>
> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted."

This case, because it is not unique, is an appropriate one for the exercise of this Court's certiorari jurisdiction. Since the decision in *Hamilton v. Municipal Court*, 270 Cal.App.2d 797 (1969), broad and sweeping prior restraints on the expression of the criminally accused are now a matter of course in California. And, as the opinion in *State, ex rel., Superior Court of Snohomish Co. v. Sperry*, *supra*, *Chase v. Robson*, *supra*, and *United States v. Tijerina*, *supra*, demonstrate, this new form of broad prior restraints is not an exclusively California matter.

There is also another reason why this case is a particularly good one for review of the significant First Amendment issue it presents.[10] Because this court's decision in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), can be read to validate contempt convictions resting upon facially unconstitutional court orders, it will be extremely difficult for a case challenging an overbroad publicity order to reach this Court which will not contain a *Walker* issue.[11] This case, however, contains no *Walker* issue; it poses the First Amendment issue exclusively. This case is unfreighted with a *Walker* problem, because,

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[10]Since certiorari was denied when this case was styled *Hamilton v. Municipal Court*, 396 U.S. 985 (1969), one might infer that this Court does not share the opinion that this case is one meriting review. We prefer to think that the earlier denial of certiorari was produced by the posture of the case: an interlocutory appeal. Respondent cannot now argue, as it did before, that the broad language of the prior restraint might be narrowed at trial. We have had the trial and the restraint was not narrowly construed.

[11]The Supreme Court of Washington noted the *Walker* dilemma confronting anyone who would challenge a pre-trial publicity order in *State ex rel. Superior Court of Snohomish Co. v. Sperry*, *supra*, 483 P.2d at 611-612.

under California law, a court order unconstitutional on its face is considered a nullity which may be violated with immunity. *In re Berry*, 68 Cal.2d 137 (1968).[12]

Petitioner is not being punished because he violated a court order; he is being punished for violating a court order deemed constitutional by the Court below.

CONCLUSION

The First Amendment protects our most cherished freedom. We have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Any court order inhibiting the exercise of freedom of speech should, at the very least, contain specific findings explaining its necessity, *Chase v. Robson*, *supra*, 435 F.2d at 1061, and should be narrowly drawn to insure that free expression is inhibited only to the extent required for elimination of the substantive evil that has inspired the order. Id. at 1061-1062; *State ex rel. Superior Court of Snohomish Co. v. Sperry*, *supra*, 483 P.2d at 613. The court order in this case does not meet even those minimal standards.

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[12] In California one may violate a facially unconstitutional court order even though he has not sought judicial modification of that order. *In re Berry*, *supra*, 68 Cal.2d at 148-149.

For that reason, and all the reasons mentioned, petitioner respectfully urges that his petition for writ of certiorari be granted.

Dated, October 12, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 25,126

Steven Hamilton, Michael Smith, Stewart Alpert and Jerry Rubin,
Plaintiffs and Appellants,
vs.
The Municipal Court for the Berkeley Albany Judicial District,
Defendant and Respondent.
People of the State of California,
Real Party in Interest and Respondent.

OPINION

On November 30, 1966, a complaint was filed in the Municipal Court for the Berkeley-Albany Judicial District which charged the defendants, who are the appellants here, with violating Penal Code sections 372 (committing a public nuisance) and 602 (unlawful occupation of real property or structures). These charges grew out of a widely publicized demonstration on the campus of the University of California at

Berkeley, protesting the presence of recruiters for the armed services of the United States.

At a pretrial hearing the court, in an effort to secure a fair trial for the parties, issued an order, the pertinent parts reading thus: "A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy. B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations. The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter."

Trial was set for Monday, January 16, 1967. On Friday, January 13, in front of the Municipal Court Building where the trial was to take place, the defendants held a press conference, and issued a statement to the news media for immediate release. The

statement condemned the court's pretrial order and openly and deliberately violated its restrictions.

The defendants were convicted of the charges against them. They were then charged with violation of Penal Code section 166(4) (criminal contempt) for their wilful disobedience of the pretrial order. They sought prohibition from the Superior Court of Alameda County to prevent their prosecution. The writ was denied. This appeal followed.

Appellants first argue there was no justification for the municipal court's pretrial order because it is an unconstitutional restriction upon their right of free speech. They cite and rely upon *Bridges v. California* (1941), 314 U.S. 252; *Fort v. Civil Service Commission*, 61 Cal.2d 331, 337-338, and *Bagley v. Washington Township Hospital Dist.*, 65 Cal.2d 499, 506-509. But in *Sheppard v. Maxwell* (1966), 384 U.S. 333, the United States Supreme Court recognized the danger to the right of fair trial by unwarranted and prejudicial publicity, and suggested a method whereby the right of fair trial could be preserved without an unconstitutional encroachment upon the equally protected rights of free speech and free press. In *Sheppard* the court said the trial court in that case ". . . might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector test; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence;

or like statements concerning the merits of the case." (p. 361). Again, at page 363, the court declared: "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." We construe this language of the court to mean that in proper cases, where the right to a fair trial may be at issue, the court is required to take steps to control the release and dissemination of facts and evidence likely to be presented to the court or the jury in the course of the trial. Thus authority for issuance of the pretrial order in this case seems to us unassailable.

Appellants argue in effect, however, that direct proof must be made that specified information will have a prejudicial effect upon the trial before a valid order may be made limiting distribution of such material. We do not accept this view. Although pretrial orders must be carefully drawn so as not to unduly restrict protected rights, it is virtually impossible for any order to cover every aspect of evidence, fact or information that may arise. Moreover, the trial judge cannot be made the personal censor of every statement contemplated by each participant in the trial. An order specific enough so that all parties know what is proscribed is sufficient.

Appellants next contend that the pretrial order was issued without reference to the clear and present dan-

ger test. (See Schenck v. United States, 249 U.S. 47, 52; Thomas v. Collins, 323 U.S. 516; Weaver v. Jordan, 64 Cal.2d. 235, 243.) In *Bridges* (p. 263) the court said: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Here, the evil the trial court sought to prevent by its order was the denial of a fair trial to all parties by harmful and prejudicial publicity generated by those involved in the proceedings then before the court. The imminence of the danger which the court sought to foreclose is clear. At the time the court made its order, lawlessness and student strife on the campus of the University of California at Berkeley were matters of common knowledge, of which the trial court could take judicial notice. A large number of newspaper articles and pictures have been made a part of the record in this case, and are lodged with us. These publications reflect the extensive nature of student disorder at the time the court acted and while trial was pending. The sole purpose of the court's order was to assure a fair trial, and in the highly charged atmosphere in which the order was made its formulation and announcement was not merely justified but was required by directions contained in *Sheppard*.

Appellants cite and rely upon *Crosswhite v. Municipal Court*, 260 A.C.A. 444. That case is not helpful to them. In *Crosswhite*, the contemner ran a newspaper advertisement intended to prejudice potential

jurors in favor of the defendant. It was admitted however that neither defense nor prosecution could say whether the advertisement had helped or harmed one or the other. Accordingly the appellate court rightly concluded that the advertisement did not present a "clear and present danger" to the administration of justice and set the finding of contempt aside. In our case however, arrest of the appellants was attended by wide publicity. After arrest and before plea the defendants distributed statements attacking the University, charging their arrest was political and that the trial would be a political trial. In light of prevailing tensions, the probability that the prosecution or defense might issue statements which would interfere with a fair trial was high. The duty of the court to take reasonable measures to assure a fair trial was therefore plain under the requirements stated in *Sheppard*. We think the order of the trial judge, attempting to balance the right of all parties to a fair trial against the equally protected right of free speech, properly issued in this case.

Appellants also argue that the broadness of the court's order interfered with their right to reply to the charges against them. We find this argument to be without merit. The order does not prohibit the defendants from describing the charges against them and unequivocally asserting their own innocence. It does prohibit discussion of the merits of the case and the evidence and arguments that might be presented at trial, and in this respect goes no further than the permissible limits noted in *Sheppard*. Appellants

assert however that language in *Endler v. Schutzbank,* 68 C.2d 162, 180, supports their right to reply at length to the charges expressed in the complaint. In *Endler* the court said in part that: ". . . fundamental fairness requires that an individual be permitted to defend himself publicly against official charges, however informal, which threaten to stain his personal and professional future. [Citations.]" That case is readily distinguishable from the one we here consider. In *Endler,* the Corporation Commissioner made charges affecting the reputation of the plaintiff, and thereby precluded his employment in his chosen field of endeavor. The Commissioner offered the plaintiff no more than an informal, administrative hearing before his agency, with the pre-hearing statement that the Commissioner would not be bound by the result of the hearing, whether it favored the plaintiff or not. Thus the plaintiff there could never have secured any vindication of the charges made against him. But in our case, appellants asserted their innocence and were to be given a public trial, with every facility made available to them for the production of evidence and witnesses. The very purpose of the court's order was to guarantee a fair trial before an unprejudiced jury, thus assuring to appellants the right to make an effective reply to the charges made in the People's complaint.

Appellants further argue that the pretrial order must fall because it fails to meet constitutional standards which require the order to be formulated with narrow specificity so as to meet the particular evil

sought to be regulated. (See N.A.A.C.P. v. Button, 371 U.S. 415, 433; Cantwell v. Connecticut, 310 U.S. 296, 311; Fort v. Civil Service Commission, supra, 61 Cal.2d 331, 337, and cases cited.) We do not think the order made in this case fails to meet the required standard. It must be remembered that the order was announced in the atmosphere of a widely publicized controversy concerning campus lawlessness and disorder, and that great public attention was focused upon the arrest of the defendants and their pending trial. It was a clear certainty that tensions would not abate during the interval between arrest and trial. The court's order sought only to have the issues judicially determined in open court, on competent evidence, rather than by the community upon the basis of information supplied by partisans and carried by the news media. The order applied to the parties and their counsel. Such persons were before the court, and subject to its proper orders. Nor can there be any successful attack upon the order because it also applied to law enforcement agencies, the Regents of the University and the Associated Students. Although the University was not a party to the proceedings, it was the party said to have been directly offended by the conduct of the defendants, and agents and officers of the University might well have been witnesses at the trial. The same may be said of the Associated Students of the University. They were involved in matters touching upon the merits of the issues then before the court and were potential witnesses. *Sheppard* enjoined trial judges to protect the sanctity of trial proceedings by guarding them from the

unwarranted statements of ". . . prosecutors, counsel for the defense, the accused, witnesses, court staff [and] enforcement officers coming under the jurisdiction of the court. . . ." the court's order made in this case complies with the mandate of *Sheppard*, and we must uphold it.

The judgment is affirmed.

Salsman, J.

I concur:

Brown (H. C.), J.

I dissent.

Defendants' brazenly flagrant flouting of an order obviously made for their own protection can hardly evoke sympathy for them. Nonetheless, I feel that the pretrial order of the municipal court goes beyond permissible limits, and thus cannot afford a basis for punishment. (In re Berry, 68 Cal. 2d 137, 147-9.)

The seemingly broad admonition of the United States Supreme Court (Sheppard v. Maxwell, 384 U. S. 333, 363) is subject to limitations recognized but not emphasized in that opinion.

The "clear and present danger" limitation applies. The *Sheppard* opinion cites with approval a number of decisions emphasizing that rule (e.g., Craig v. Harney, 331 U.S. 367; Pennekamp v. Florida, 328 U.S. 331; Bridges v. California, 314 U.S. 252.) The essence of that rule is that the "substantive evil must be extremely serious and the degree of imminence

extremely high before utterances can be punished" (Bridges v. California, *supra*, at p. 263.) Review of the authorities makes clear that the requisite degree of clarity and imminence is rarely found.

The order here was issued on the court's own motion. Thus we have no moving papers, affidavits, or exhibits. The order contains no recital of facts which were before the court, merely stating that "to secure a fair trial in this case it is essential to keep pretrial publicity to an absolute minimum." This statement, of course, would apply to most cases awaiting trial, and does not show any past or threatened events to establish the requisite degree of clarity and imminence of danger in this trial. Appellants' counsel have lodged with us clippings from three newspapers for the period from December 1 to close of trial, but they have two deficiencies for our present inquiry: It is doubtful that this material establishes the requisite clear and present danger. More important, we do not know that they were before the court or motivated its decision to issue the order. Thus I have grave doubts that this first test of the order has been met.

In any event, the order seems to me too broad and uncertain to support penal sanctions. Overbreadth and uncertainty in a penal statute render it void (Thornhill v. Alabama, 310 U.S. 88; Fort v. Civil Service Com., 61 Cal. 2d 331). When an enactment restricting free speech is attacked upon these grounds, the courts may consider the operation of the enactment as to factual situations and parties other than those presently before the court (N.A.A.C.P. v. Button,

371 U.S. 415, 432-3; In re Hoffman, 67 Cal. 2d 845; Fort v. Civil Service, *supra*). The rule against overbreadth and uncertainty applies to a temporary restraining order (In re Berry, *supra*, 68 Cal. 2d 137.) It seems clear that a pretrial order of the type before us, restricting release of information pending trial, is subject to like limitations.

This order bars release to news media of "information or opinion concerning the trial or any issue likely to be involved therein." The prohibition was not limited to assertions of views in a context relating them to the issues of the trial, but could be construed to bar even comments which made no reference to the trial, so long as they dealt with any subject "likely to be involved" in it. Similarly, the order could well be read to bar the use of news media by either side in a search for witnesses to the events of the demonstration. I recognize that the trial judge doubtless intended no such restriction, and that violation in these respects was unlikely to be punished. But the rule on overbreadth nonetheless strikes down the order.

Moreover, the restrictions were specifically extended to the "Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations." Literally applied, this restricted students and faculty, not parties to the pending action, from discussing among themselves events and issues of great and immediate concern to them, whenever newsmen might be present. The pro-

hibition of release "directly or indirectly" could have this effect even if publicity were neither sought nor anticipated.

However provocative the words of defendants, they can be punished only if the order is valid. Disagreement with the words spoken does not warrant limiting the freedom to speak them. Unpleasant as it is to me to deprive defendants of the limited martyrdom for which they seemed so anxious, I would reverse the judgment and direct the municipal court to sustain the demurrer.

Draper, P. J.

Filed March 20, 1969.
Lawrence R. Elkington, Clerk.

Appendix B

Superior Court of the State of California
in and for the County of Alameda

Clerk's Notice in re Ruling
Action No. 502

People of the State of California,
Plaintiff & Respondent
vs.
Michael James Smith, Stewart Albert,
Jerry Rubin and Steven Hamilton*
Defendant & Appellant*

In the above entitled action pending in Appellate Department, you are hereby notified that this action having been heretofore submitted on briefs on July 16, 1971, comes now the Court and orders: Judgment on appeal Affirmed. Remittitur to issue.

(Endorsed)

Date July 20, 1971

Jack G. Blue, County Clerk
By: Beryl Thorlakson, Deputy

* * * * * *

Certificate of Mailing

I, Jack G. Blue, County Clerk and Clerk of the above entitled Court, do hereby certify:

That on July 20, 1971, I served copies of the above notice by depositing them enclosed in sealed envelopes with postage thereon, fully prepaid, in the United States Post Office at Oakland, California, addressed as follows:

D. Lowell Jensen, District Attorney, Court House, 1225 Fallon Street, Oakland, California 94612; Jeffrey Horner, Deputy District Attorney, 600 Washington Street, Oakland, California 94607; Paul N. Halvonik, American Civil Liberties Union of Northern California, 503 Market Street, San Francisco, California 94105.

Jack G. Blue, County Clerk,
By: Beryl Thorlakson, Deputy.

Filed July 20, 1971,
Jack G. Blue, County Clerk,
By Beryl J. Thorlakson, Deputy.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-548

STEVEN HAMILTON, *Petitioner*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

The record does not provide an adequate factual framework for resolution of the important constitutional issue of striking a proper balance between free speech and fair trial

II

Petitioner's contempt conviction is constitutionally valid

A. The trial court issued its order upon a clear and present danger that pretrial publicity would prevent a fair trial by an impartial jury

B. The trial court's duty to insure a fair trial for all parties compelled it to issue a pretrial publicity order authorized by Sheppard v. Maxwell

C. There is no constitutional requirement that the statements actually made in violation of the order posed a clear and present danger of preventing a fair trial by an impartial jury

Conclusion

Table of Authorities Cited.

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1 Bentham: Rationale of Judicial Evidence (1827) pp. 573-577 19

4 U. C. L. A. L.Rev. (1956-1957) pp. 475, 477 19

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-548

STEVEN HAMILTON, *Petitioner*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner's misdemeanor contempt conviction was affirmed by the Appellate Department of the Superior Court of Alameda County, State of California. Certification to the Court of Appeal was denied. The opinion is unreported and appears as Exhibit B to the petition.

Prior to the trial, petitioner sought a writ of prohibition from the Superior Court, contending that the pretrial publicity order was constitutionally invalid. The petition was denied on July 6, 1967. The denial was affirmed by the California Court of Appeal in a reported opinion. *Hamilton v. Municipal Court*, 270 Cal.App.2d 797 (1969), *cert. denied*, 396 U.S. 985 (1969). The opinion appears as Exhibit A to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's contempt conviction may be upheld where the record reveals (1) a valid pretrial publicity order issued upon a factual showing that pretrial publicity attending petitioner's sit-in trial posed a clear and present danger of preventing a fair trial; and (2) a deliberate violation of that order by petitioner.

2. Whether the factual record presented herein is an adequate one for this Court to resolve an important constitutional issue involving the balance between the right to a fair trial and freedom of speech.

STATUTES INVOLVED

The First, Sixth and Fourteenth Amendments to the United States Constitution.

California Penal Code section 166(4):

> "Every person guilty of any contempt of court, of either of the following kinds is guilty of a misdemeanor:
>
> "4. Willful disobedience of any process or order lawfully issued by any court;"

STATEMENT OF THE CASE

The record consists of the settled statement on appeal plus numerous newspaper clippings introduced into evidence by petitioner at the contempt trial.[1] Our summary thereof follows:

By a complaint filed on November 30, 1966, in the Municipal Court for the Berkeley-Albany Judicial District, petitioner, and others, were accused of violating Penal Code section 372, committing a public nuisance, and section 602(1), unlawful occupation of real property or structures. These misdemeanor charges grew out of a widely publicized demonstration on the campus of the University of California at Berkeley, protesting the presence of recruiters for the armed services of the United States.

A pretrial hearing was held on December 16, 1966.[2] In order to secure a fair trial for all parties, and after discussion with the prosecutor and defense counsel, in petitioner's presence, the Court entered its order, providing in pertinent part as follows:

---

[1]The contempt trial was not before the same judge who issued the pre-trial publicity order. *Cf., Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

[2]Only two days earlier, on December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas to the trespass and nuisance charges, on December 13, 1966, petitioner and his cohorts distributed a mimeographed statement which declared:

> "[T]he university is making us scapegoats. Our arrest is a political arrest; this will be a political trial.
>
> "There were students who were leaders in the demonstration who were not arrested, and some non-students arrested who were clearly not in the leadership of the action.
>
> "The six of us arrested have one thing in common—we are all non-students and we have been previously active in political events that have been embarrassing to the administration."

"*Pretrial Publicity*

"To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day,

"A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

"B. This order shall apply *inter alia* to the parties and their counsel, to all law enforcement agencies, to the regents of the University of California and their agents and employees, and to the Associated Students of the University of California, their members and affiliated organizations.

"The Court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The Court will entertain motions for any farther orders that may be necessary or desirable in this matter."

Trial was set for Monday, January 16, 1967. On the preceding Friday, January 13, in front of the Berkeley-Albany Courthouse, where the trial was to take

place, petitioners held a press conference. They issued "FOR IMMEDIATE RELEASE" this statement:

> "'We have decided to speak to the Press for the following reasons:
>
> "'1. The gag rule comes after the University, Sacramento, and powerful interests in the State have prejudiced people against us.
>
> "'2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the prosecution always attempts to hide political activities behind legal language.
>
> "'3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.
>
> "The reason for this press conference is that we are making an attempt to ensure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.
>
> "Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false

view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If this is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

"Nobody planned in advance the sit-in that occurred. The University had in the past permitted picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protestor, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Vietnam Day and Black Power Day. This is, then, clearly a case of political persecution.

"As to our rights to be active politically on the Campus; we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter

> the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them."

On the day petitioners held their press conference, they were arrested and charged with statutory criminal contempt, in violation of Penal Code, section 166(4). That section makes "willful disobedience of any process or order lawfully issued by any Court" a misdemeanor.

On January 16, 1967, petitioners were tried and convicted on the original charges.

On March 1, 1967, petitioners demurred to the contempt complaint. Their demurrer was overruled on March 27, 1967. Petitioners next applied to the Superior Court of Alameda County for an alternative writ of prohibition staying their trial for contempt. The alternative writ was issued on June 19, 1967. The matter came on for hearing and on August 25, 1967, final judgment was entered denying the petition for a peremptory writ of prohibition, the alternative writ being discharged. On March 20, 1969, the California Court of Appeal affirmed the judgment of the Superior Court. On May 14, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion. A petition for a writ of certiorari was denied by this Court on December 15, 1969. 396 U.S. 985 (1969).

The contempt trial was held on March 12, 1970. The evidence consisted of petitioner Hamilton's testimony and numerous press clippings introduced by him. On March 31, 1970, petitioner was found guilty of contempt.

ARGUMENT

I

THE RECORD DOES NOT PROVIDE AN ADEQUATE FACTUAL FRAMEWORK FOR RESOLUTION OF THE IMPORTANT CONSTITUTIONAL ISSUE OF STRIKING A PROPER BALANCE BETWEEN FREE SPEECH AND FAIR TRIAL.

The settled statement on appeal was prepared by petitioner's present counsel. It was certified as the record on appeal by the trial judge. The district attorney did not object, but neither did he stipulate to the statement.

According to the settled statement, petitioner testified that the statement of January 13, 1967, in violation of the pretrial publicity order, was issued only after consultation with counsel Melvin Belli. Mr. Belli is said to have advised petitioner and his co-defendants when he represented them at the trespass trial that the order was unconstitutional and should be tested by issuing a statement. Belli also allegedly advised them that it was not necessary to seek modification of the order, that the only way to test it was to issue a statement. Appellant admitted making the statement with knowledge of the pretrial order and with the intent to violate the order, but for the motives stated above (Petition, pp. 8-9).

The settled statement is in direct and unequivocal conflict with the facts revealed in several of petitioner's newspaper exhibits.

The Berkeley Gazette of January 14, 1967, reported the following account by Jerry Rubin, one of petitioner's co-defendants:

> "The group's attorney Melvin Belli, is out of the country according to Rubin, and will not return until late tonight. He admitted yesterday's action was done without consulting Belli."

On January 17, 1967, the Oakland Tribune reported the following statement by Mr. Belli, requesting continuance of arraignment proceedings on the contempt charge:

> "His clients, Belli said, 'felt there had been so much (adverse) publicity . . . and they are vocal and political . . . that they had to say something.' He was out of town so couldn't advise them otherwise."

In light of the glaring contradictions, respondent respectfully submits that the factual record is inadequate to serve as a basis for resolving important constitutional issues. Consequently, it is urged that denial of certiorari is compelled on this ground alone.

II

PETITIONER'S CONTEMPT CONVICTION IS CONSTITUTIONALLY VALID

Seeking reversal of his contempt conviction, petitioner urges this Court to disapprove the pretrial publicity order issued below on the ground that it unduly restricted his constitutional right to discuss publicly the political and social implications of his participation in a civil disturbance giving rise to criminal charges against him. Petitioner apparently would have the Court believe that he violated the order so as to enlighten the public on pressing social issues and to vindicate his First Amendment rights.

We perceive an altogether different purpose. When virtually on the eve of trial, petitioner deliberately defied the trial court's injunction, he made his purpose clear:

> "1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.
>
> ". . .
>
> "The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
>
> ". . . The harm against us is already done; the jury has already been prejudiced. The University; both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. . . . We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible."

Interestingly, petitioner lets his real motive slip out in his present petition: "The people had heard the government's side, why should they not hear the other side?" Petition, p. 11.

Petitioner was equally candid in his appeal to the state Court:

> "[A]ppellants' statement constitutes an attempt to redress what appellants believe to be an imbalance in the press coverage of the events at the University."
>
> Appellants' Opening Brief in Court of Appeal, 14.

Petitioner now justifies his "brazenly flagrant flouting of an order obviously made for [his] own protection"[3] by arguments which debilitate *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Until *Sheppard*, this Court struggled vainly to resolve the apparent conflict between the rights of fair trial and free expression. *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950); *Wood v. Georgia*, 370 U.S. 375 (1962). By applying the "clear and present danger" test in *Bridges*, *Pennekamp*, and *Craig*, the Court effectively removed contempt as a means of controlling the communications media. It was generally believed that those decisions brought into irreconcilable conflict the guarantees of the First and Sixth Amendments, free speech and free press and fair trial.

---

[3]Petitioner's Exhibit A, ix.

Sheppard brought a new approach and a new hope: preservation of both free press and fair trial by specific limited judicial restrictions upon speech. The Court showed that the free press-fair trial dilemma is not an unavoidable conflict to be resolved only by preferring one right to the other; it is a potential conflict avoidable by application of procedural devices, including pretrial publicity orders. In effect, the Court acted to interrupt temporarily the media's sources of prejudicial information, impliedly finding a constitutional difference between broadly silencing the press through the unfocused threat of contempt and carefully limiting its information sources.

We urge this Court not to retreat from *Sheppard*, but to continue to entrust to the judiciary, the traditional guardian of First Amendment liberties, the task of securing a fair trial to accused and accuser by issuing pretrial publicity orders when it appears that the Sixth Amendment right otherwise might be lost. Some, mindful of *Bridges* and its progeny, doubt that *Sheppard* means what it says.[4] Denial of the instant petition would bolster their confidence in *Sheppard*.

A. The trial court issued its order upon a clear and present danger that pre-trial publicity would prevent a fair trial by an impartial jury.

Petitioner first contends that the pretrial publicity order constitutes a prior restraint on speech made by the trial court without a specific finding of a "clear

[4]See, *e.g.*, Petitioner's Exhibit A, ix.

and present danger" of prejudice to a fair trial. Petition, pp. 12-13.

We disagree. Petitioner himself has submitted numerous newspaper articles concerning petitioner, his impending trial, and the campus events giving rise to the charges against him. In this material, the California appellate court found evidence adequate to support the implied finding of the trial court that continued pretrial publicity posed a "clear and present danger" to a fair trial. *Hamilton v. Municipal Court*, 270 Cal.App.2d 797, 801-802, 76 Cal.Rptr. 168 (1969).

Indeed, the appellate court applied the "clear and present danger" standard notwithstanding our opposition. Given the procedural safeguards built into a criminal trial, particularly the opportunity to *voir dire* prospective jurors, we emphasized that an accused or his accuser rarely could demonstrate that prejudicial publicity *immediately imperiled* a fair trial. *Cf. Craig v. Harney*, 331 U.S. 367 (1947). One seeking the protection of a judicial order would be forced to wait until the anticipated injury was inflicted. See *Crosswhite v. Municipal Court*, 260 Cal.App.2d 428, 67 Cal.Rptr. 216 (1968). If *actual* prejudice remained the standard for reversal in prejudicial publicity cases, the "clear and present danger" test, as customarily verbalized, would be perfectly workable. However, in *Rideau v. Louisiana*, 373 U.S. 723 (1963), this Court rejected actual prejudice as the exclusive test. An accused now need show only *inherent* prejudice. That is, given massive, pervasive and prejudicial publicity, partiality will be presumed despite

juror's claims of fairmindedness. *Sheppard v. Maxwell, supra.* The standard of reversal in publicity cases is now far more sensitive than is the "clear and present danger" test. To protect defendants against wrongful conviction, and to safeguard the people's one and only opportunity for a fair trial, the standard for protection against prejudicial publicity, we reasoned, should be made to conform with the standard for reversal. A pretrial publicity order would be proper if the trial court reasonably concluded that there otherwise existed a *reasonable likelihood* that pretrial publicity would interfere with the separate rights of accused and accuser to a fair trial by an impartial jury.

We pointed out that none of this Court's decisions applying the "clear and present danger" test in contempt cases involved a jury trial. "[T]he limitations on free speech assume a different proportion when expression is directed toward a trial. . . ." *Wood v. Georgia, supra,* 390. *Bridges, Pennekamp,* and *Craig* did not involve a statutory contempt or willful disobedience of a judicial order. Each of those cases did involve the "unfocused threat" of the contempt power, *Bridges v. California, supra,* 269, applicable not only to the parties but to the press. In contrast, this case involves a narrowly restricted threat of contempt, limited to the parties and excluding the press. Further, those to whom the order is directed are not made to guess at what is forbidden; they are told what is temporarily prohibited. We objected that the "clear and present danger" test imposed a tyranny of labels.

Words—"clear," "present," "immediate," "peril"—cannot substitute for a weighing of competing interests. Our position was well articulated in *Pennekamp v. Florida, supra,* at 336:

> "Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

Our view gained the approval of the United States Court of Appeals for the Tenth Circuit, in *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969), *cert. denied,* 396 U.S. 867 (1969), decided after *Hamilton.* In affirming a contempt conviction for violation of a pretrial publicity order by criminal defendants, the Court of Appeals rejected the contention that such an order could be entered only if pretrial publicity posed a "clear and present danger" to a fair trial.

> "The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices." 412 F.2d at 666.

The California Court of Appeal, however, adhered to the "clear and present danger" standards as formulated in *Bridges v. California, supra,* at 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Hamilton v. Municipal Court, supra,* at 801.[5]

The substantive evil which the trial court sought to prevent was extremely serious. The People have no recourse from an unfair trial by a prejudiced and partial jury. An accused has but one: reversal and retrial. "[R]eversals are but palliatives . . . ," however, "the cure lies in those remedial measures that will prevent the prejudice at its inception." *Sheppard v. Maxwell, supra,* at 363. Mr. Justice Jackson, dissenting in *Craig v. Harney, supra,* at 394-395, observed that:

> "The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit."

The probability that several of the enjoined parties would issue statements containing prejudicial material was high; the probability that petitioner would

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[5]The Seventh Circuit has yet to determine whether clear and present danger or reasonable likelihood is the test for evaluating the validity of pre-trial publicity orders. *Chase v. Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970). Further, petitioner's reliance on *State ex rel. Superior Court of Snohomish Co. v. Sperry,* 483 P.2d 608 (Wash. 1971), is misplaced. There, the court order applied directly to the press rather than, as here, to its sources. *Compare, Farr v. Superior Court,* 22 Cal.App.3d 60, ____ Cal. Rptr. ____ (1971).

attempt to influence community opinion approached certainty. On December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas the day before, petitioner and his associates distributed a mimeographed statement. See Footnote 2, *supra*.

The trial court's judgment that, if left unrestrained, petitioner again would attempt to prejudice the community in his favor was vindicated by the statement issued in violation of the order. In a sensational case featuring nationally known defendants represented by equally prominent counsel, where a party has made earlier efforts to mold public opinion, continued efforts may well succeed. The Court of Appeal correctly concluded that "[t]he imminence of the danger which the [trial] court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* at 801.

The trial court's response was an order carefully tailored to meet the exigent circumstances. Petitioner's freedom of speech was restricted in a limited and temporary manner. The order was effective only from December 16 until trial, scheduled for January 17. Petitioner was restrained from speaking to the public only as to matters covered by the order. The trial court issued its order in petitioner's presence, and invited the parties to seek a clarification or modification as necessary.

Contrary to his assertion, petitioner was not "gagged" by the pretrial decree. If he sincerely believed he was a victim of political persecution, petitioner could have effectively aired his grievance by

seeking a modification of the order or applying for a writ of prohibition in the appellate courts. Either legal action would guarantee publicity sufficient to satisfy even petitioner.

B. The trial court's duty to insure a fair trial for all parties compelled it to issue a pre-trial publicity order authorized by Sheppard v. Maxwell.

We have so far justified the Court's order as a constitutional accommodation between the People's right to a fair trial and the petitioner's right to speak his mind. The Supreme Court of New Jersey, in *State v. Kavanaugh*, 243 A.2d 225, 231 (1968), identified another compelling interest: the public interest in the integrity of the judicial process. *Cf. United States v. Tijerina*, *supra*, at 666. When, on the eve of trial, a party resorts to the forum provided by the news media, he impugns the integrity of the judicial process. If pre-trial restraints are placed upon the prosecution, as *Sheppard* mandates, but voluble defendants are left free to hold press conferences denouncing the motives of the prosecution, the prosecution's evidence and witnesses, or commenting upon the merits of the case, the public will immediately perceive unfairness. The trial court, having stilled the accuser but not the accused, will no longer be regarded as an impartial tribunal.

The State has a right to a fair trial. *State v. Kavanaugh*, *supra*, at 231. An accused may be enjoined from disseminating before trial information which by its prejudicial nature jeopardizes the public right to a fair trial. *United States v. Tijerina*, *supra*, at 666.

"[J]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). A criminal defendant has no right to prejudice the community in his favor even as the prosecution and its witnesses are stilled. "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Hayes v. Missouri*, 120 U.S. 68, 70 (1887), quoted in *Swain v. Alabama*, 380 U.S. 202, 220 (1965).[9]

In *Sheppard v. Maxwell* this Court declared:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, *the accused*, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363 (emphasis supplied.) See *id.* at 361.

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[9] That the public is entitled to a fair trial is implicit in decisions recognizing the public's right to a public trial. The latter right, enjoyed by accused and accuser alike, safeguards the independent interests of both in receiving a fair trial. See *Kirkpatrick v. Superior Court*, 143 Cal.App.2d 745, 752 (1956); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Singer v. United States*, 380 U.S. 24, 35 (1965).

Jeremy Bentham recognized that the interest of the public in open trial is separate from the interest of the parties themselves. The public's right may not be waived even with judicial consent. "The reason is, that . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the persons concerned (the judge included), be made a sacrifice." Bentham, Rationale of Judicial Evidence (1827), vol. 1, pp. 573-577. *Accord*, 4 U.C.L.A. L.Rev. 475, 477 (1956-1957). And see *Cox v. State*, 238 A.2d 157, 158 (Md. 1968).

Unlike the accused, the People may not seek a change of venue because of prejudicial publicity; unlike the accused, the people have no remedy in reversal because a defendant has prejudiced but one of twelve jurors. In controversial cases, as here, the public's right to a fair trial must rest upon the efficacy of a judicial order made effective by the sanction of contempt. No order could be effective if a defendant is left free to prejudice prospective jurors under the guise of redressing an asserted imbalance of "information. A criminal defendant has other adequate protection against partial jurors including voir dire examination, change of venue, continuance, mistrial, and reversal on appeal.

The Supreme Court of New Jersey recently said of the Canons of Professional Ethics:

> "The ban on statements by the prosecutor and his aids applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence."

State v. Van Duyne, 204 A.2d 841, 852 (New Jersey, 1964). The Canons of Ethics do not apply to defendant personally, but the principle recognized in *Van Duyne* does.

Petitioner urges that fundamental fairness demands that he be permitted publicly to defend his reputation against criminal charges. He was afforded this opportunity when in open court he pleaded not guilty. The pretrial order expressly permits him to publicize his plea. Petitioner further had the opportunity to vin-

dicate himself at trial. To the extent that they conflict, the accused's interest in protecting his reputation in a manner and a time of his own choosing must accede to the public's interest in a fair trial. Otherwise, criminal defendants could and would, without fear of rebuttal, attack the reputation of their victims in the sensitive pretrial period.

Petitioner further contends that the order issued by the trial court prevented him from expressing publicly his opinion on the grievances underlying the demonstration on the Berkeley campus which led to the filing of the original charges against him. This contention is utterly without merit; the order does not limit such discussion. On December 17, 1966, the Berkeley Daily Gazette reported that Judge Brunn, who issued the order, said that it was not designed to halt debate on the campus. Petitioner submitted this news report to the trial court.

It is urged that if pretrial orders are permissible, government will silence its critics by commencing criminal proceedings against them. Petition, 14 n. 7. First, *this order* had no such effect. Petitioner remained free to discuss publicly circumstances underlying University disturbances. Newspaper articles presented by petitioner in the trial court attest to continued public discussion of that subject. Second, pretrial orders are entered by judges, not by prosecutors or public office holders. We are confident that the independent judiciary of this State will remain untainted by the corruption and villainy petitioner would attribute to the executive branch.

C. There is no constitutional requirement that the statements actually made in violation of the order posed a clear and present danger of preventing a fair trial by an impartial jury.

Alternatively, petitioner contends that his contempt conviction should be reversed because there has been no factual showing that the statements actually made by petitioner posed a clear and present danger to a fair trial.

Petitioner profoundly misunderstands the thrust of *Sheppard*. We have indicated at the outset that *Sheppard* takes a new direction. Standards enunciated in *Bridges* for controlling the press are not the standard applicable under *Sheppard* for controlling the sources of information. Contrary to petitioner's view, *Sheppard* does not require a factual showing that the statements actually made affected the fairness of the trial. All that is required to support a contempt conviction is a valid order based upon a clear and present danger to a fair trial and proof that the order has been violated (see *United States v. Tijerina, supra*, 412 F.2d at 666), here by statements "concerning the merits of the complaint, the evidence or arguments to be adduced by either side or trial tactics or strategy."

To require an additional specific showing that each statement made posed a clear and present danger to a fair trial would prevent a court from entering any effective prophylactic order and require it to act as a censor throughout the pretrial period. See, *Hamilton v. Municipal Court*, *supra*, at 801. This would be totally unworkable since trial participants will not always trouble themselves to clear each statement they wish to make with the court, nor should the court be

troubled with each statement contemplated by the participants. It suffices that if the order is valid and petitioner violated it, his contempt conviction must be affirmed.

CONCLUSION

For the stated reasons, we respectfully urge this Court to deny the petition for writ of certiorari.

Dated, San Francisco, California,
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